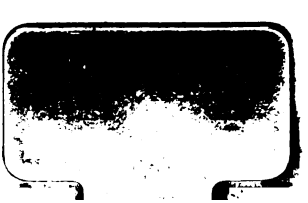

A

LETTER

ADDRESSED TO THE

LORD VISCOUNT MELBOURNE,

BY

C. FANE, ESQ.

ONE OF THE COMMISSIONERS OF HER MAJESTY'S

COURT OF BANKRUPTCY,

RELATIVE TO

THE JURISDICTION OF THAT COURT IN CASES OF CONTEMPT.

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PREFACE.

THERE can be no doubt, that the Bankrupt Law, and the system, by which it is administered, require a thorough revision, and very extensive reform. Numberless cases might be cited to establish this; one will suffice. Mr. Chambers was declared bankrupt in 1825; twelve years have since elapsed, and it remains undecided, whether he was a bankrupt or not; meanwhile £170,000 have been collected, £49,500 have been expended in litigation and its consequences, prodigious waste has been occasioned by mismanagement, not one farthing has reached the general creditors, and the balance in hand does not amount to £8000. Such are the fruits of an absurd system!

When that great man and sincere Law Reformer, Lord Brougham, entered on the subject of Bankruptcy Reform, he gave a clear outline of his plan: he said, "I will reform the Bankrupt Law, and

the Bankruptcy Tribunals; but I will reform the tribunals first; for the reformed tribunals will be themselves the instruments of reforming the law, by the information, they will acquire and communicate, and the suggestions, which experience will enable them to furnish." He accordingly limited his endeavours, in the first instance, to the reform of the Tribunals, and his great principle was to make them *Courts.* From the most ancient times the existing system had been a violation of first principles; for it is a first principle, that, whenever disputes arise about property, or public aid is to be given in the administration of property, the subject-matter shall be placed under the jurisdiction of a *Court;* yet Bankruptcy had, from time immemorial, been subject to the jurisdiction of tribunals, if indeed they deserved the name, which were not Courts, but were called Lists of Commissioners. "This," he said, "I will put an end to; I will put Bankruptcy, like all other subjects of judicial investigation, under the jurisdiction of *Courts.*" Accordingly he carried a measure, which, as far as words went, was amply sufficient to effect his intention: but to make a law is one thing, to interpret it another; and it is vain for the Spirit of Reform to preside at the making of a law, if

the Spirit of Anti-Reform is to preside over its interpretation: three years after the Act was passed, the question arose, whether the most important branches of the New Establishment, namely, the Tribunals of the Commissioners, did or did not constitute *Courts;* and it was decided, that they did not.

The writer of the following letter had for some time fancied, that he had observed in some quarters, not only an unwillingness to advance in the course of reform originally contemplated by Lord Brougham, but a disposition to recur to old errors, and their consequent abuses; and he determined on this occasion to make an appeal to the Head of the Government. He accordingly prepared the following Letter, and printed it for private circulation amongst those who were likely, either from duty or inclination, to take an interest in the subject. Two Sessions of Parliament having since elapsed, producing nothing but attempts at reform, so abortive, as to have given rise to suspicions of insincerity, the Letter is now published, with a view of calling upon the commercial world seriously to consider, whether it is for their interest, that Six Tribunals, sitting daily in the City of London, entrusted with the performance of duties of the highest importance, and

established for the very purpose of more effectually repressing the gross and monstrous frauds,* notoriously perpetrated under the shelter of the Bankrupt Law, should be held not to be Courts, and therefore not armed with those powers of instantly and summarily repressing contempts, which the common law accords to the lowest Courts in the kingdom, and without which it is impossible for any Court to perform its duty efficiently in those very cases, in which its interference is *most imperiously* demanded.

* A very remarkable case, which occurred in 1831, will be found in the Appendix. See Note A.

A LETTER,

&c.

My Lord,

I feel it to be my duty to address a letter to your Lordship, for the purpose of calling the attention of his Majesty's Government to the situation, in which the Commissioners of his Majesty's Court of Bankruptcy have been placed by a decision, pronounced in June last by the Court of Exchequer, in the matter of a fine, imposed by myself upon a gentleman for contempt of court.

The circumstances, under which that fine was imposed, were shortly these :—In January, 1835, I was informed by the official assignee in the matter of Kensington, a bankruptcy prosecuted before me, that Messrs. A., G., F., and Co., the solicitors to that bankruptcy, claimed to have a bill of 46*l.* 14*s.* 8*d.* paid to them out of the bankrupt's estate; that the bill had been taxed at 44*l.* 9*s.* 2*d.*, which he had offered to pay, but that he had received the following letter :—

"*Re* KENSINGTON.

"16th *Dec.* 1834.

"SIR,

"Believing, as we do, that no improper charge has been made in *our account against Mr. Jones,* we shall not submit to a reduction of one shilling. So soon as you send us a cheque for the amount and the deeds, we are prepared to pay 500*l.*

"I called several times at your office this morning, but unfortunately did not see you.

"I am Sir (for partners and self),

"Your obedient servant,

"G. F.

"*Mr. W. Whitmore.*"

Upon inquiry it appeared, that this bill was not the usual bill, which a solicitor to a bankruptcy has against the estate, but a bill against a Mr. Jones, the father-in-law of the bankrupt and petitioning creditor, who had purchased the whole of the estate, and for whom Messrs. A. & Co. had acted, first, in taking out the fiat, and afterwards in the matter of the purchase, though still acting for the estate. After carefully inquiring into the facts, I was of opinion, that there was no pretence for burthening the estate with this payment, and I sent for Mr. F., *as the legal adviser to the estate,* and communicated to him this opinion; and upon his resisting it, and, as I thought, clearly shewing a disposition to take part *against* the estate, I expressed, I believe, disapprobation of his conduct in acting for Mr. Jones in the

matter of the purchase, while solicitor to the estate. Shortly after I received a letter, which appears, by an affidavit of Mr. F., to have been as follows:—

"*Re* KENSINGTON.

"SIR,

"Mr. Jones is surprised at the proposition made at your suggestion; and the more so that any objection should be made to carry into effect an agreement *bonâ fide* made with the official assignee, about which there could be no difficulty or misapprehension in his own mind, whatever construction might be put on his proposition. For my own part, having looked more fully into the whole transaction, I do not hesitate to say, *I think you have assumed a tone and conduct which you are not warranted in using;* and that, on a reconsideration of the whole question, I am satisfied I have pursued the only course which in the discharge of my duty I could safely or honourably have pursued, and which meets the approbation of those gentlemen to whom I have thought proper to name it, on which I can securely rely.

"I am, Sir, (for partners and self),

"Your obedient servant,

"G. F.

"*Mr. Commissioner Fane.*"

On the 8th of January a meeting took place to audit the accounts of the estate. No one attended from the office of the solicitors, except a clerk; but the assignee and some creditors being present, I

directed their attention to the circumstances which had occurred.

That it was my duty to do so, is clear. It is the duty of a Commissioner to superintend the administration of the estate, and to see that all other persons, who in the inferior departments are assisting in that administration, are performing their duties with fidelity. It is the duty of the solicitor to act in any matter, in which the estate is interested, *exclusively* for the estate: he is not at liberty to embarrass himself in the performance of his duties by accepting retainers, or in any way acting for a party, who either has or may have an interest, adverse to that of the estate; and if he has incautiously done so, from not expecting that there could arise any clashing of interests, it is his duty, the moment such conflict of interests does occur, to withdraw himself from the service of one of the parties, and thus to leave that party at liberty to choose himself an adviser free from all improper bias. Mr. F. did not adopt this course, but continued to act for the estate *and for its antagonist also.* It was in this state of affairs that I addressed the assignee and creditors. On taking my seat in Court the next day, the following letter was delivered to me:

"*Re* KENSINGTON.

"8th *Jan.* 1835.

"SIR,

"I have received a message by my clerk, that you considered it 'highly improper and unjust that this estate should be saddled with these charges.

Without entering upon the question, how far it was consistent with the station you fill to send such a message by that gentleman, I beg leave to repeat my own opinion, that it would be *dishonest* to attempt to cast them on Mr. Jones; and that I am fully prepared to meet your charge, whenever and where you may think proper. In the meantime, it appears to me, that the expression of opinion on either side is not likely to benefit the estate, to which *you assume the character of protector.* It would be a satisfaction to me, if I could pay over the money according to the directions I have received.

"I am, Sir, (for partners and self),

"Your obedient servant,

"G. F.

"*Mr. Commissioner Fane.*"

The circumstances, which subsequently occurred, strongly illustrate the necessity of enforcing the rule, that the same solicitor shall not act for parties having adverse interests; for no sooner were Messrs. A. & Co. removed from their office of solicitors to the fiat, which they were by the creditors' assignee, immediately after the above letter was written, than steps were taken by the new solicitor for resisting the payment of the 46*l.*: the opinion of a King's counsel was taken; and that opinion being decidedly adverse to Mr. Jones's claim, Mr. Jones, who had refused even a reference, whilst Mr. F. and his partners remained solicitors to the bankruptcy, immediately yielded the point.

My first impression, on receiving the above letter, was, that there was no occasion to take any notice of it; but farther reflection and communication with my brother Commissioners convinced me, that my first impression was wrong, and that it was my duty to treat it as a contempt of Court, if I had the power to do so. The circumstances, which induced this change of opinion, were principally these:—1st, That the letter did not proceed from an ordinary individual, such as a disappointed litigant, but from the attorney to the fiat, who is the officer of the Court; 2ndly, That the writer was a member of a partnership of London attorneys, consisting of three individuals, and that he signed the letter "for himself and partners," from which it was to be presumed, that his act was the result of their joint deliberations; 3rdly, That the attorneys in question were at the head of a very large establishment, and that, *as not only the letter, but even the address, was in the handwriting of a clerk*, it was presumable, that the object had been to let it be known throughout the establishment, with what contumely their principals had thought it becoming to treat a member of one of his Majesty's Courts of Justice; and, lastly, That the object of this letter evidently was to deter me, by insults, from performing my duty to the creditors and to the public. I thought too, that, as the Court of Bankruptcy had been but lately established, it was incumbent upon me to shew, *at once*, that such outrages could not be committed with impunity; and I thought the outrage in question the greater, because, as at-

torneys are allowed to plead personally before Commissioners, it was as if a barrister of one of the Courts at Westminster had addressed a similar letter to a Judge*.

Having thus satisfied myself that it was my duty to act, if I possessed the power, the next question was, whether a single Commissioner of the Court of Bankruptcy, sitting alone, had power to fine or imprison for contempts; and upon this question I proceeded carefully to examine the authorities, before taking any step. I did this, not because either myself or any other Commissioner of the Court had previously entertained any doubts upon the point, but because this was the first occasion on which any Commissioner had felt himself seriously called upon to take such a step; and I thought it due to the importance of the subject not to act unadvisedly. I therefore examined the authorities, and in the result it appeared to be clear, that each Commissioner possessed the power, whether the question were considered with reference to the dictates of common sense, the principles of the common law, or the express provisions of the Act of Parliament, which created the Court of Bankruptcy, and its branches.

* The above details were given, because the writer was anxious to shew that he had not exercised a power lightly, which, however essential the *possession* of it may be to the very idea of a Court of Justice, ought not to be actually *used* otherwise than with the utmost caution, and under a strong sense of moral responsibility.

And, first, with respect to the dictates of common sense.

In every court, or place set apart for the administration of justice, there must be a governing power somewhere: there must be some authority, whether it consist of one individual or more, in whom must be vested a discretional power to give directions for the conduct of the business in detail, and to compel the observance of decorum. Unless such power be vested somewhere, every thing *must* fall into confusion. In the absence of such power, every person would be at liberty to wear his hat in Court; all persons might speak at once; every one might abuse and impute bad motives to his antagonist, or his antagonist's counsel or attorney, or abuse and insult the Judge for deciding in the way he has done. The unseen and but rarely felt power, which prevents all this confusion, is the power of dealing with contempts in a summary way. It is by the law of contempts, that the Judge's order, that A. shall be heard first, and B. afterwards, is enforced; for disobedience to that order is a contempt. It is by the same law, that angry persons are kept within bounds, and prevented from giving a loose to their passions, and indulging in coarse and disorderly abuse of their antagonists. It is by the same law, that they are compelled to submit with patience to the decree or censure of the Judge; and, if he has erred, seek redress by due course of law elsewhere, and by way of appeal, and not by giving vent to anger and disappointment by personal abuse of him. Common

sense, then, seemed to require, that the Commissioner, who by law presides in an open Court, *and alone*, should, in his individual capacity, possess this power.

Then, with respect to the principles of the common law.

It is laid down by Mr. Justice Blackstone, in his Commentaries*, as a fundamental principle, that all the King's *superior* Courts of Justice have power to punish contempts; and then, after giving several instances of contempts, he proceeds to observe, that this power must necessarily be as ancient as the laws themselves. "Laws," he says, "without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power, therefore, in the supreme Courts of Justice to suppress contempts, results from the first principles of judicial establishments†, and must be an inseparable attendant upon every superior tribunal." He then adds, "And though a very learned author seems inclinable to derive this power from the Statute of Westminster, yet that learned author (Mr. Baron Gilbert) afterwards more justly concludes, that it is a part of the law of the land."

Mr. Justice Blackstone then lays it down, that this power is part of the common law, and not derived from any statute.

* Bk. iv. c. 20, s. 3. See also Bk. iv. c. 9, s. 5; and particularly p. 126.

† See a passage to the same effect from Erskine's Inst. of the Law of Scotland, quoting a maxim of the Civil Law. Appendix, note B.

In like manner it is laid down in Hawkins's "Pleas of the Crown," a work of great learning and authority, under title "Of Contempts against the King's Courts"*—"That he who makes an affray in any of the King's *inferior* Courts of Justice is highly fineable; and that he who speaks contemptuous and reproachful words to the Judge of *such* a Court, in execution of his office,—as if one give the lie to a Judge of a *Court Leet*, in the face of the Court; or, being admonished by him to pull off his hat, say, 'I do not value what you can do;' or tell him in the face of the Court, that he is forsworn, or call him fool, &c.; or say, 'If I cannot have justice here, I will have it elsewhere;'—such person is immediately fineable by such Judge."

Here again the existence of this power is attributed, not to the provisions of any statute, but to the great principles of the common law.

In a case† mentioned in "Croke's Reports," where the Mayor of Barnstaple had imprisoned a man for speaking contemptuously of him in *common conversation*, and the legality of the commitment was called in question in the King's Bench, although the Judges declared such commitment illegal, yet they held, that "*if the mayor had been in a public place of justice*, and the party had called him by such opprobrious words *there*, he might have imprisoned him." In

* Bk. i. c. 21, ss. 10, 11.

† Simons *v.* Sweet, Cro. Eliz. 78.

another case*, in the same book, where the steward of a Court Leet had imposed a fine upon a man for saying to him, in his court, "In saying so thou liest," it was held by the Judges that the steward had the right to impose the fine, and the party fined was compelled to pay it.

The same doctrine is again repeated in Hawkins's "Pleas of the Crown," where the author speaks of the Sheriff's Court †, and again where he speaks of a Court Leet‡; and in those cases he attributes the power to the Sheriffs' Steward §, or the Lords' Steward ||, who are the Judges of those Courts.

It did not appear, from any of these authorities, that this power was possessed by Courts as Courts of Record; it was attributed to them as *Courts of Justice.* The expression in Blackstone, in Hawkins, and in the Mayor of Barnstaple's case, is "Courts of Justice," not "Courts of Record;" and accordingly, we find that the Chancellor and Master of the Rolls, who, while sitting as Judges of Equity, *are confessedly not Courts of Record,* have immemorially exercised the power of punishing contempts in a summary way. In the case of Burdett *v.* Abbott, questions were raised by Sir F. Burdett respecting the power of the House of Commons to commit for contempt: of course their power to commit was held

* The Earl of Lincoln *v.* Fysher, Cro. Eliz. 581.

† Bk. ii. c. 10, s. 15.

‡ Bk. ii. c. 11.

§ Bk. ii. c. 10, introduction to s. 13.

|| Bk. ii. c. 11, s. 5; and see Bl. Com. bk. 4, c. 9, s. 5, p. 126.

to be indisputable; but Mr. Justice Bayley*, in his judgment, citing Lord Coke, attributed their possession of this power, not to the circumstance of their being a Court of Record, but to that of their being "*a Court of Judicature.*"

Satisfied by these authorities, that, if the Commissioner's Court could properly be deemed one of the King's Courts of *Justice*, superior or inferior, the Commissioner would possess this power by the common law, and as an incident to his office, just as the Steward of a Court Leet possesses it by the common law, and as an incident to his office—the next question was, Whether the Commissioner's Court was a King's Court of Justice? That, if it was a Court of Justice at all, it was a King's Court of Justice, was clear; for the Commissioner sits by the appointment of the Crown, and under the immediate authority of the King's letters patent: the question then was, Was it a Court of Justice at all? Now, if it was not, what was it? How happened it that justice was administered there at all? That a portion of the King's justice was, in fact, daily administered there, was indisputable:—then, by what authority?

It was suggested that the situation of a Commissioner of the Court of Bankruptcy might be considered analogous to that of London Commissioners of Bankrupt under the superseded system, Country Commissioners of Bankrupt under the present system, Commissioners of Charitable Uses, Commis-

* 14 East's R. 159.

sioners for the Examination of Witnesses in Chancery Causes, Commissioners under Commissions issued out of Chancery to set out Boundaries, Commissioners of Lunacy, and other like Commissioners, who sit to assist in the administration of justice, and yet are not Courts, and are not armed with the power of punishing contempts. But the answer was obvious:—All such functionaries are merely the servants or delegates, either of the Court of Chancery or of the Chancellor; they all receive their nomination and derive their authority, not from the Crown, but from the Court of Chancery or the Lord Chancellor; their appointment is merely occasional, and may be suspended or superseded at the pleasure of the Chancellor; the instrument of appointment is merely a commission issued out of Chancery on the fiat of the Chancellor; and an interruption of them, or a disobedience of one of their lawful commands, is a contempt, not of themselves, but of the Court which created them, *on the known common-law principle, that an interruption of any servant of a Court, even the lowest, such as a messenger serving an order, is a contempt of the Court itself.* On the other hand, a Commissioner of the Court of Bankruptcy is not the servant or delegate of any Court or any individual: he is the nominee of the Crown, and derives his authority from the Crown; his appointment is not occasional, but permanent, for he holds his office during good behaviour; the instrument of appointment is not a common commission; he is appointed by letters patent: and an interruption of

him must, therefore, upon common-law principles, be a contempt of him, or of the Crown itself, for there is no intermediate power. It seemed therefore, that, unless at the expense of all principle and analogy, it would be impossible to consider an interruption of a Commissioner as a contempt of any authority, other than himself.

The authorities above alluded to clearly shewed that the common law did not concern itself with the question, whether its principle would practically vest the power in one individual or more? It vested this power in the presiding authority, and did not concern itself to ask, whether, if that presiding authority consisted of one individual, it consisted of so high a functionary as a Lord Chancellor, a Master of the Rolls, or a Judge at Nisi Prius, or so low a one as the Mayor of a town, or the Steward of a Court Leet; and, on the other hand, where the presiding authority consisted of more than one, it vested the power in the body, and not in any individual of the body, however exalted a functionary that individual might be: and hence, while it vested a similar power in the Court of King's Bench, the Court of Common Pleas, and the Court of Exchequer, it did not vest it in any individual Judge of any of those Courts. The common law seemed always to have yielded to the necessity of the case; to have felt, that order must be preserved in Courts of Justice at all risks; and that, upon the whole, it was better to rely on the SOLE discretion of a person, who had been so far trusted by the Crown, as to have the power of administering

any portion of the King's justice, SITTING ALONE, than, by withholding all power, leave him, and all who attended his Court, at the mercy of every rude or passionate man.

But, if the matter seemed clear upon the dictates of common sense and the principles of the common law, it appeared clearer still, when the language of the Act, and of the Letters Patent, by which the Court was erected, came to be examined.

The Act is intitled, "An Act for establishing a Court of Bankruptcy;" and by the first clause it is enacted, "That it shall and may be lawful for his "Majesty, his heirs and successors, by charter or "letters patent under the great seal of the United "Kingdom of Great Britain and Ireland, to erect "and establish a Court of Judicature, which shall be "called 'The Court of Bankruptcy,' and by com-"mission under the great seal to appoint one person, "being a serjeant or a barrister at law of not less "than ten years' standing, to be the Chief Judge "of the said Court; and three persons, being ser-"jeants or barristers at law of not less than ten "years' standing at the bar, or of five years' standing "at the bar, having previously practised five years as "a special pleader below the bar, to be other Judges "of the said Court; and six persons, being barristers "at law of not less than seven years' standing at "the bar, or of four years' standing at the bar, "having previously practised as a special pleader for "three years below the bar, to be called Commis-"sioners of the said Court; and from time to time

" to supply any vacancy in the number of the said " Judges and Commissioners; and the same Court " shall be and constitute a Court of Law and Equity, " *and shall, together with every Judge and Commis-* " *sioner thereof, have, use, and exercise all the rights,* " *incidents, and privileges of a Court of Record, or* " *Judge of a Court of Record, and all other rights,* " *incidents, and privileges, as fully, to all intents and* " *purposes, as the same are used, exercised, and en-* " *joyed by any of his Majesty's Courts of Law or* " *Judges at Westminster.*"

The above enactment, although it constituted the intended Court a Court of Law and Equity, and conferred on it all the rights, incidents, and privileges of a Court of Record, did not in express terms declare it a Court of Record; but this defect, if it were one, was supplied under the King's letters patent* by the powers of the prerogative: for by those letters patent his Majesty expressly constituted " the said Court to be a Court of Record."

Upon examining the Act it appeared, that, as there was but one object to be attained, namely, the due administration of a bankrupt's estate, so there was but one instrument, called a fiat, to be used, as the foundation of all proceedings, and in strictness of language but one Court, the Court of Bankruptcy, in which the business was to be conducted; but, as that one object, the due administration of the bankrupt's estate, involved a large mass of detail, too

* Printed 1 Deac. & Ch. R. in Bankruptcy, 2.

extensive to be managed by one Court, and as that one Court, consisting of ten individuals, would have been a machine too cumbrous to be useful, it was arranged, that that one Court should never sit for any purpose whatever, but should at once sub-divide itself into distinct tribunals, each taking its portion of the business to be done; and accordingly the first few sections of the Act provided for the formation of several Courts; a Court of Review under the presidency of the Judges; and Six Courts of Commissioners, each under the presidency of a single Commissioner; and in order that the acts of each of those Courts might be duly recorded as acts of the Court of Bankruptcy, two principal and eight deputy registrars were provided to be in attendance upon them. These Courts were to be in constant action; and between them was exhausted the whole jurisdiction, or nearly so, previously exercised by the Lord Chancellor and the London Commissioners of Bankrupt.

Provision was also made for the occasional formation of two other Courts, to be called Subdivision Courts, *to which a very limited jurisdiction was assigned.*

From the period of the passing of the Act to the present time, the Court of Review, and the Courts of the Six Commissioners, have sat constantly in the performance of their duties; but the Subdivision Courts have not assembled more than perhaps twenty times in the last four years.

It appeared at first sight a little strange that the

legislature should have given to the *Court of Bankruptcy* all the rights, incidents, and privileges of a Court of Record, as that Court had no duties to perform, and was never intended to sit; but, upon reflection, it appeared clear, that the intention was, that the act of every functionary of the new Court, done pursuant to his jurisdiction, should be deemed an act of the Court of Bankruptcy, and recorded as such; and that, therefore, the rights, incidents, and privileges of the Court should be deemed the rights, incidents, and privileges of every branch of the Court*, whether it consisted of one individual or more, that sat to perform the duties assigned to the new Court. It appeared that the framers of the Act had taken the Court of Chancery for their model†; and had, for that reason, furnished the new Court so largely with officers well known in

* The principle, that the power of self-protection, which belongs to the whole, belongs to each part, into which the whole may lawfully subdivide itself for the more effectual attainment of the main object of the institution, is the great principle which pervades the whole of Lord Ellenborough's argument in Burdett *v.* Abbott, 14 East's R. 1. "The House of Commons and House of Lords," says he, p. 147, "are but the grand Council of the Realm, divided into "two different parts, each carrying with it this essential power and "privilege to protect itself, which each has exercised ever since "(and therefore must be presumed collectively to have exercised "before) their separation."

† Mirror of Parl., Sess. 1831, p. 838. "Lord Wynford.—"Is not the jurisdiction of the Bankruptcy Court essentially a "*common-law* jurisdiction?" "The Lord Chancellor.—The con-"nection between the Commissioners of Bankrupts and *the Court* "*of Chancery* is most manifest."

the Court of Chancery, and indispensable to the performance of its functions, though totally unknown in Courts of Common Law; namely, registrars and deputy registrars*. Indeed, the analogy between the framework of the Court of Chancery and that of the new Court of Bankruptcy was evident.

In the Court of Chancery there is but one Court, though there are many functionaries, all authorized to act in the name of the Court; namely, the Chancellor, the Master of the Rolls, and the Vice-Chancellor: the same might be said of the new Court of Bankruptcy.

If the Court of Chancery be considered to consist of the Chancellor, the Master of the Rolls, and the Vice-Chancellor, the Court of Chancery never sits; so, if the Court of Bankruptcy be considered to consist of all its functionaries, it never sits.

Each functionary of the Court of Chancery sits alone, and his acts are registered by the registrar or deputy registrar attending him, not as his act, but as an act of the Court of Chancery: so, some of the functionaries of the new Court, the Commissioners, were intended to sit alone, and to be attended each by a deputy registrar; and all acts done by them, and which they were authorized to do, were to be registered as acts of the Court of Bankruptcy; and, accordingly, every act done by a single Commissioner,

* Mirror of Parliament, Sess. 1831, p. 3074. "The Attorney-"General.—Any gentleman who will take the trouble of going to "the Registrar's Office of the *Court of Chancery*, will see the "necessity of these offices."

within the limits of his jurisdiction, is deemed an act of the Court of Bankruptcy, is recorded as such, and must be, and in fact is, treated as such by every other Court in the kingdom, just as every act done by the Master of the Rolls or Vice-Chancellor is deemed to be an act of the Court of Chancery, and is recorded as such, and must be treated as such by every other Court.

To have adopted any other view, than that above suggested, as to the meaning of the first clause, would have involved this gross absurdity,—that the Legislature would have used the most forcible language to give the most extensive rights, incidents, and privileges to a Court, which could never by any possibility "use or exercise" them*.

* Any one, who attempted to frame an Act of Parliament for erecting a Court, would soon find the convenience of attributing the jurisdiction and power, not to the individual, the Judge, but to the abstraction, the Court. Upon constitutional principles every Court must have an historian of its acts; he may be called Registrar, or Recorder, or by any other name, but his function is always the same; and it is to ascertain, what individual or individuals are entitled to act in the name of the Court, and what are acts of Court; and it is to his attestation that you must look, to learn what is an act of Court; you will look in vain for the signature of the Judge. The former jurisdiction in Bankruptcy was not in a Court, but in individuals, and hence an order in Bankruptcy was authenticated by the signature of the Chancellor himself. When the *Court* of Bankruptcy was created, that branch of it which was called the Court of Review very properly abandoned the practice of *signing* orders; and now the form of authentication there is, "By the Court, A. B. Registrar." A similar alteration ought to have taken place in the Commissioners' Courts, but habit is all-powerful. Reference to the above theory would account for those curious old forms in original

It is true, that this view of the case appeared, at first sight, to be embarrassed by such an anomaly as this, that a Judge of the Court of Review, as such, would not, in his individual capacity, be authorized to fine or imprison for contempts; yet, if he happened to sit as Commissioner, which, by the Act, he might do, he would have the power. It appeared, however, that the known and undisputed law furnished similar anomalies; for a Judge of the King's Bench, as such, and in his individual capacity, has no power to fine or imprison for contempts; he must act, if at all, with his brethren; yet the same Judge, sitting in the inferior capacity of a Judge at Nisi Prius, or sitting in the Bail Court, does possess the power: so the Master of the Rolls, sitting as one of the Lords Commissioners of the Great Seal, as such, and in his individual capacity, does not possess the power; as Master of the Rolls he does: so the Lord Chief Baron of the Exchequer, sitting with the Barons in the Outer Court as Chief Baron, and in his individual capacity, does not possess the power; sitting in Equity, in the Inner Court, he does: so a Commissioner of the Insolvent Debtors' Court, sitting with his brethren in London, in his individual

and judicial writs:—"Witness ourself at Westminster;" "Witness Sir A. B. Knight, Chief Justice." To me those forms seem to speak thus:—"This is an act of the Crown, and I the King attest it;" "This is an act of the Court, and I the Chief Justice attest it;" thus keeping up the distinction between the abstraction and the individual. The quaint title of M. Chateaubriand's pamphlet, "Le Roi est mort, vive le Roi," is a confused application of the same theory.

capacity, does not possess this power; sitting alone in the country, he does. The necessities of the respective cases justify all these anomalies; IT BEING THE PRINCIPLE OF THE COMMON LAW, TO GIVE NEITHER MORE NOR LESS OF DISCRETIONAL POWER THAN THE NECESSITIES OF THE CASE DEMAND*.

Having thus satisfied myself that the law had armed me with the power in question, and that it was my duty to exercise it, and finding, also, that I had the full sanction of my brother Commissioners for taking the step I proposed, I followed the course prescribed by Mr. Justice Blackstone in his Commentaries in cases of contempt†, summoned Mr. F. to appear before me, interrogated him upon oath touching his contempt, and, upon his confession, after having fully heard him in his defence, I adjudged him guilty of a contempt of Court, and ordered him to pay a fine of 10*l.* to his Majesty.

Mr. F. paid the fine into the Exchequer, and then moved the Court, that the money might be returned to him, on the ground *that a Commissioner of the Court of Bankruptcy, sitting alone, had no power to fine for any contempt whatever, whether in the face of the Court or not.* His Majesty's Attorney-General having appeared on behalf of the Crown, the case was argued, after which the Court gave judgment; and having declared it to be their opinion, that a

* See a curious confirmation of the above argument, as to the true intention of the legislature. Appendix, note B. C.

† Bk. iv. c. 20, s. 3, pp. 286, 287.

single Commissioner had no power to punish any contempt, they ordered the 10*l.* to be returned.

The effect of this decision was, that it stood publicly proclaimed, upon the authority of the Court of Exchequer, that any man, to whom a Commissioner of his Majesty's Court of Bankruptcy happened to give offence in the performance of his duties, might offer to him, either in Court or out of Court, any insult which anger or disappointment might suggest, and that with perfect impunity; it even went further; for it proclaimed, with equal publicity, that every person present in Court might, with equal impunity, insult or outrage every other person, who might, in the exercise of his lawful rights, chance to give him offence. I say, with perfect impunity, because the only method of proceeding, even suggested, as a means of repressing such outrages, was a method which, even if the law would sanction it, would never be resorted to in practice, but which, as I conceive, the law would not sanction. The suggestion fell from my Lord Abinger, who is reported to have said*, "I see no difficulty at all in allowing "the Commissioner, when he is acting in his indi- "vidual capacity, and meets with an obstruction, to "bring his complaint before the Court of Review, in "like manner as he might have brought it before the "Chancellor." With great deference to that learned Lord, I would ask, upon what principle could any such proceeding be instituted? The great princi-

* R. *v.* F. 2 Mont. & Ayrt. Rep. 340.

ple of the Law of Contempts is this,—that an interruption of any servant, agent, or delegate of a Court, engaged in the performance of his duty to the Court, is an interruption, and therefore a contempt, of the Court itself: and it was upon this principle, that an interruption of a Commissioner of Bankrupts, under the superseded system, was held a contempt of the Chancellor, and to be dealt with by him upon complaint made; for the authority of the Commissioner was derived from a commission issued by the Chancellor, and directed to his nominees. But how could such principle apply, when the Commissioners' authority emanates from the Crown, and is given by the King's letters patent? Upon what rational or intelligible principle could an interruption of such a functionary be deemed an interruption, and therefore a contempt, of the Court of Review; from which he derives no authority whatever, and whose coming into existence, as a Court, was contemporaneous with his?

But, even if the law would sanction such proceeding, what probability is there, that it would ever be resorted to in practice? The confusion which prevailed in the Courts of the Commissioners under the superseded system, is notorious; yet there is no instance of the Commissioners having ever "made their complaint" to the Chancellor; and if the nominees of the Chancellor never, in any one instance, appealed to their own patron for protection, that patron being the Lord High Chancellor of England, what probability is there that a Commissioner of his

Majesty's Court of Bankruptcy, holding his office by the immediate appointment of the Crown, and being entitled by Act of Parliament to "have, use, and "exercise all the rights, incidents, and privileges of "a Judge of a Court of Record, as fully, to all "intents and purposes, as the same are used, exer- "cised, and enjoyed by any of his Majesty's Judges "at Westminster," would ever consent to degrade the dignity or supposed dignity of such an office, by appealing for protection to any authority inferior in point of rank and dignity to the Lord Chancellor?

But, assuming that the Commissioner were willing to address himself to the Court of Review, what course must he adopt? The suggestion was, that he should "make his complaint." Did this mean that he should sink the character of Judge, in that of suitor, and present a petition? If so, he must, according to the usual form, intitle it, "The *humble* "petition of," &c. &c.; he must serve it on the supposed delinquent; how is he to ascertain his name and residence? he must then file affidavits, substantiating his case: if affidavits should be filed on the other side, he may be called upon to file counter-affidavits, and thus vie in affidavits with a man who, as he is by the hypothesis bold and rude enough to insult the Court, is surely not a very fit antagonist for the person selected by the Crown to preside there. Would a contest of that sort be one into which a Commissioner could enter with honour, or from which he could, in any event, retire without disgrace? Then, who is to pay the expense of all

these proceedings? The Commissioner? Perhaps it may be said, that the delinquent would ultimately pay them; but might not the delinquent prove insolvent?

But, assuming that the Commissioner were willing to act such a part as that above suggested, or incur such pecuniary risks, is it fit that he should do so? A Commissioner of the Court of Bankruptcy sits under the authority of an Act of Parliament, which confers upon him the very extensive "rights, incidents, and privileges" above adverted to*: he is appointed by letters patent, whereby his Majesty, after confirming to every Judge and Commissioner all the "rights, incidents, and privileges given and "granted by the Act of Parliament," and ordaining that the Judges and Commissioners shall hold their offices during good behaviour (which is the tenure by which the Judges at Westminster hold their offices), gives them rank and precedence in these words:—"And we do further give and grant to the "said Judges and Commissioners rank and pre-"cedence in all our Courts of Law and Equity in "manner following; that is to say, to the Chief "Judge of the said Court for the time being rank "and precedence next after the Puisne Judges of our "Courts of King's Bench, Common Pleas, and Ex-"chequer, for the time being respectively; and to the "other Judges of the said Court of Bankruptcy for the "time being, rank and precedence next after our said "Chief Judge of the said Court for the time being; and

* P. 22.

"to the Commissioners of the said Court for the "time being, rank and precedence next after "our said other Judges of the said Court for the "time being*." He sits daily in one of the Courts

* The interpretation which the heads of the several Law Societies have given to the very strong language cited above from the Act of Parliament and the letters patent, is not a little singular. Considering the importance of the functions assigned to these new functionaries, that to the Judges is committed part of the former jurisdiction of the Chancellor, and to the Commissioners a jurisdiction teeming with trust and confidence; that to the Court, as a body, is given rank and precedence next to that of the Court of Exchequer, and to the individual members rank and precedence of a corresponding character; and considering that it appears to be one of the great principles of the several Law Societies, that in consideration of the exclusive privilege, which they enjoy, of admitting or rejecting candidates for the right of practising as advocates at the Bar of the *King's* Courts of Justice,—a privilege which is the source of all their wealth, power, and consequence,—they should act in strict alliance with the Crown, by promoting to the place of honour *within their own circle* those members on whom the King has bestowed honour *publicly;* considering all these things, it would surely have been natural to expect, that some *one* member of the new Court would have received some *single* mark of respect from the Law Society to which he belonged, as a tribute due to an office thus honoured by the Crown and by Parliament. The result has been entirely otherwise: no member of the Court, either Judge or Commissioner, who previously formed part of the governing body of his Society, has had any additional rank or precedency assigned him in respect of his office; neither has any member, who was not previously of the governing body, been invited to the Bench, although it is a matter of course for the Society to invite to the Bench every one of its members, without distinction, who obtains *even a common Patent of Precedency.*

It is impossible to know with certainty upon what principle these exclusions rest, because those bodies have hitherto exercised the prerogative of irresponsible power, that of deciding and giving no reason; it is, however, generally understood that the reason is, that

of a building, which is called, by Act of Parliament, "The Court of Commissioners of Bankrupt:" he is attended by a deputy registrar, an usher, and an establishment of messengers; he is also attended by three official assignees: he is intrusted by the Crown to hear and determine questions of a value in money wholly unlimited; within these few days a case has come before me, wherein the Counsel who opened it, claimed to prove a debt of 33,000*l.*, and upon inquiry it appeared, that the funds in hand amounted to 20,000*l.*, and upwards: he is also intrusted to hear and determine other questions of still higher

the rank and precedence conferred by the Letters Patent, is limited *to Courts of Law and Equity only!!* If this be the reason, it is attended with this consequence, that it impliedly imputes to the Crown the having intended to *delude* the members of the new Court, by bestowing on them rank and precedence *in those places only where they could never, by any possibility, be.* How far this is consistent, either with justice to the individuals, or with that respect to the Crown, which is so peculiarly due from bodies, themselves enjoying distinctions, derived solely from the favour of the Crown, or how far it is calculated to promote the public interest, seem to be questions well deserving of serious consideration.

The Commissioners appointed by his late Majesty to report on the state of the Common Law Courts, after alluding in their Sixth Report to the *irresponsible* power of the Benchers of the different Law Societies, observed,—"This state of things does not appear to us "to be satisfactory." "We cannot think, that powers, in the right "use of which society is so deeply interested, ought to be left, "without control, in the hands of persons, whose functions are not "of a public and responsible kind." The resolute determination of the Law Societies to exclude the members of the New Court, as such, from all participation in the honours of their respective Societies, and thus systematically to discountenance this first emanation of Law Reform, seems to confirm the justice of those observations.

importance; such as whether a man be bankrupt or not; which involves the question, whether the whole property of a person, real and personal, shall be seized into the hands of the law: or whether such bankrupt trader shall pass his last examination or not; which is, in substance, whether he shall ever again be restored to the world of commerce or not, or whether a person shall have his personal liberty restrained by commitment: is it fit, that a functionary, so intrusted, should ever be called upon to act such a part as that above suggested? Certain it is, that there is not a single instance in the whole annals of the law, of a person acting in a judicial capacity under the King's letters patent, appearing as a suitor in any other Court for redress in cases of contempt.

I shall not presume to express any opinion whether this important decision was right or wrong. It is before a tribunal from which there is no appeal, the opinion of an enlightened profession. I feel it however to be my duty to offer some observations on the reasons offered in support of it.

It was argued for Mr. F. that the power claimed was "enormous," and their Lordships appear to have adopted this view; for my Lord Abinger speaks of it as "so important a power;" and Mr. Baron Bolland speaks of it as "a great power;" and Mr. Baron Alderson speaks of it as "so large a power;" but can a power be deemed enormous, which the common law vests in the presiding functionary of every Court of Justice, down to that of the mayor or recorder

of a corporation, or the steward of a court leet ?—a power which is given by the Insolvent Debtors' Court Act to the individual Commissioners of that Court* ?

* Since writing the above I have been referred to the following authorities :—

Rex *v.* Langley, Salkeld, 697. By the Court.—" When im-" proper words are spoken of a Magistrate in Court, the Magistrate " may proceed summarily against the party, and fine him for the " contempt."

Rex *v.* Revel, 1 Strange, 420.—A person was indicted for speaking disrespectfully to *a Justice of Peace* whilst in the execution of his office. It was objected that the indictment lay not. The Court said,—" It is true *the Justice may make himself Judge, and* " *punish immediately ;* but still, if he thinks proper to proceed less " summarily by way of indictment, he may."

These, it is true, are not modern authorities : the first, however, of the above declarations was sanctioned by the great Lord Holt; the second by as great a friend to the liberty of the subject as ever sat in the judicial seat, Lord Camden. The following authorities are modern :—

Mayhew *v.* Locke, 7 Taunton, 63, (1816).—The plaintiff, being a constable, said to a Magistrate, " If you have any more warrants to " serve, do not send them to me, for I will not serve them; you may " serve them yourself." The Magistrate committed him by a *verbal* order only. An action being brought for false imprisonment, it was contended for the defendant, that he was warranted as a Magistrate in committing the plaintiff to prison for the contempt of which he had been guilty. Mr. Justice Bayley reserved the point. When the matter came before the Court, Gibbs, C. J., expressed himself as follows :—" As to the merits, without considering whether the " words spoken were or were not a sufficient cause of commitment " by the Magistrate, we are of opinion that this commitment, which " was clearly a committal by way of punishment, and was made by " word of mouth only, *without warrant in writing*, cannot be sup-" ported; for it is clearly laid down in Hawkins, and by Lord Hale, " that such a commitment by a Magistrate must be made *in writing*."

It was also said, that the power in question was an "*irresponsible*" power. But is that so? The Commissioner is surely responsible for the exercise of it to the Crown and to Parliament; he might be proceeded against criminally, or might be deprived of his office; and the facility, which every man oppressed by power has, of bringing his case before Parliament, is notorious to all the world. It is a power, too, which, if the Commissioner exercise at all, he must exercise in the face of the world, and subject to that moral responsibility to public opinion, which is the most powerful check on misconduct. If by the expression "irresponsible" it was meant, that there was

Rex *v.* James, 5 Barn. & Ald. 894. (1822).—James was committed by two Justices for contempt by telling them, "that they "were biassed and prejudiced in their conduct towards him as Ma- "gistrates." Upon habeas corpus the prisoner was discharged; not, however, on the ground that the Magistrates could not commit for contempt, but on the ground that the commitment was "*until the* "*prisoner should be discharged by due course of law*," Lord Tenterden and the Court holding that it should have been "*for a time* "*certain.*"

It appears then, that so anxious have the Judges been to enforce a due respect to all who are put in authority, that in ancient times they have plainly laid it down, that even an individual Justice of the Peace *may* commit for contempt; and in modern times they have at least carefully abstained from unnecessarily throwing doubt upon the doctrine. It is now laid down, that a judicial functionary, acting under the immediate authority of the Crown and of Parliament, does not possess this indispensable power; but will the members of the Legislature, themselves engaged in the administration of justice, sanction a doctrine, which, while it derogates from that respect, which the common law declares to be due to all, who assist in administering justice, cannot but operate incidentally to the prejudice of their own authority?

no appeal from his act, that proposition would be equally untenable; for the Crown may remit any fine, or release from any imprisonment *inflicted as punishment;* an application to the Crown would be a mode of redress probably not more expensive or more difficult than an appeal to a Court of Justice; and the fear of such a rebuke from the Crown would probably make the most incautious cautious in the exercise of this power.

But if the subject of responsibility presented itself to the learned Judges, it would surely have been more reasonable to have put the matter thus: — "The question is, whether we should acknowledge "in the King's Commissioner a power, for the ex- "ercise of which he is responsible in many ways, and "for whose proper exercise of which there are many "guarantees; or, by denying it, give to every man "who attends his Court a power, for the exercise of "which he will be practically irresponsible, the "power of committing, at his will and pleasure, "every imaginable impropriety and indecency."

Their Lordships appear, also, to have totally misapprehended the nature of the new jurisdictions. "It appears," said my Lord Abinger*, "to have "been the object of the Act to establish a Court of "Review and two Subdivision Courts, and that the "Court of Review should have all the jurisdiction "that the Court of Chancery" (meaning of course

* R. v. F. 2 Mont. & Ayr. Rep. 339.

the Chancellor*) "before had in bankruptcy, and "*that the Courts of Subdivision should have all the* "*authority and power that Commissioners of Bank-* "*ruptcy had before;*" and then he goes on to say, that "it occurred to the framers of the Act that it "would be convenient, in many cases, as the business "increased, to allow one Commissioner to do many "of the *official or ministerial* acts," and that the Act accordingly gave the necessary powers. Mr. Baron Bolland expressed himself to the same effect; assuming that the jurisdiction of the old Commissioners was vested in *the Subdivision Courts,* and that the individual Commissioner never sat alone except for convenience-sake, and to expedite trifling matters, and then merely as a portion of the Subdivision Court, just as a Judge sits at chambers to expedite the routine business of the Court. It is impossible to conceive a greater mistake. There is not the slightest warrant for it in any part of the Act, or in the practical execution of the duties imposed by the Act on the Commissioners.

By the Act, the whole jurisdiction of the old Commissioners, with one exception, presently to be mentioned, is vested in the *single* Commissioner. The *single* Commissioner adjudicates on the bankruptcy; he presides *alone* at all the meetings; he

* Ex parte Lund, 6 Ves. R. 782. Lord Eldon.—"There is "great confusion in the language of every book relating to the sub-"ject speaking of the Court of Chancery. The jurisdiction is not "in that Court, but in the individual who happens to hold the Great "Seal."

decides *alone* on the proofs of all debts, unless he, *of himself*, and *for his own satisfaction*, thinks fit to call for the assistance of his brethren in Subdivision Court. The suitor has no right to require a Subdivision Court for this purpose, nor has he any right of appeal to the Subdivision Court; his right of appeal is to another Court, the Court of Review. The Commissioner superintends *alone* every examination, unless he shall choose to exercise the privilege above mentioned, of calling for the assistance of his brother Commissioners; it is he who approves the creditors' choice of an assignee; he *alone* appoints the official assignee; it is under his *sole* direction that all summonses and all warrants issue, even those which enable the messenger, whom he names, to break open doors; *alone* he determines the question, whether the bankrupt's accounts shall be deemed satisfactory; and thus *alone*, and without appeal, frequently determines negatively, that the bankrupt shall never obtain his certificate: sitting *alone*, he adjudicates upon every item either of debit or credit in the assignee's accounts; and in one case last year it fell to me to decide, after argument, between two classes of creditors, what should be the application of a sum of 7000*l.* sterling; in short, the *single* Commissioner has, by the new Act, the whole jurisdiction of the Commissioners under the old system, with one exception, which is this, that his power to commit for an unsatisfactory answer, instead of being a power to commit to the county gaol, is a power to commit to the private custody of the messenger attending his

Court for a term not exceeding three days, within which time the party is to be brought before a Subdivision Court for further examination.

To call the exercising such jurisdiction "the doing "of many of the *official or ministerial* acts," as my Lord Abinger does, is plainly a misapplication of language: "*ministerial*" acts are acts done by the command of a superior. In such cases, where is the command, and who is the superior who issues it?

On the other hand, the jurisdiction of the Subdivision Court is of the most limited nature; it has no power to assemble at all for the purpose of originally superintending the examination of a party, or deciding on the proof of a debt, unless with the consent and on the application of *the single Commissioner;* and the only purpose for which it has a right to assemble, without being called together by the individual Commissioner, is the single purpose of proceeding with the examination of a person already committed to custody by the individual Commissioner. The Subdivision Court has no jurisdiction, either to determine the original question of bankruptcy or no bankruptcy, or the not less important question of the certificate, or, indeed, to perform any one of the numerous duties above pointed out as the daily duties of the single Commissioner, with the exceptions above mentioned. It is, indeed, a Court of a somewhat anomalous nature, for it is scarcely to be deemed a Court of original jurisdiction, and yet it is not a court of appeal: it is to decide, because the question is considered by the individual Commis-

sioner a question of difficulty; and yet the right of appeal in the supposed *difficult* case is specially limited. The institution is scarcely ever resorted to in practice.

My Lord Abinger and Mr. Baron Bolland, in their judgments, both speak of the Subdivision Court as if that were the full Court, and of the Commissioner as if he were merely a member of the Subdivision Court, sitting apart from the rest to get through routine business, and as if every act of his had validity, only because he had an authority to do it delegated to him by the Subdivision Court, and as if his acts required for their validity the confirmation of the full Court; and they illustrated his situation by reference to that of a Judge at chambers. Now it is obvious that the situations are, in every particular, utterly unlike each other. The Judge sits in chambers, and has a right to exclude all but the parties interested and their agents: the Commissioner constantly sits in public, and has then no right to exclude any one; his Court is an open Court. The Judge is acting in the name of the Court, and by delegation from the Court, and no act of his can be enforced, if disputed, unless confirmed and adopted as an act of the full Court: the Commissioner acts entirely independently of the Subdivision Court; no act of his either requires or ever receives the sanction of a Subdivision Court; even in the matter of commitment, the commitment for the limited period is his individual act, and requires no confirmation; the subsequent commitment, if it take place, to the county gaol, is a

new act, not a confirmation of an old one. The jurisdiction of the Court at Westminster includes all that the Judge can do, and a great deal more; the jurisdiction of the Subdivision Court is not a tenth part so extensive as that of the single Commissioner; so that the supposed analogy fails in every possible particular: but it fails most in the main point, which it was intended to illustrate; for the argument was this:—A Judge at chambers cannot commit for contempt, the commitment must be by the full Court; therefore the single Commissioner cannot commit, the commitment must be—by what Court? the Subdivision Court, or what Court? There the analogy was left defective, and a most important omission it was; for when the learned Judges argued that a Judge at chambers could not commit, they stated a proposition, which involved no practical inconvenience; for no lawyer ever doubted that a contempt of a Judge at chambers was,at least, a contempt of that Court, whose operations he was assisting; the Judge would immediately, by oral communication, certify to his brethren on the Bench what had happened; the delinquent would be brought before them, interrogated, and punished. This course was pursued in Royson's case*, mentioned in Croke's reports. Royson was guilty of a contempt before Mr. Justice Whitelock, sitting in the Bail Court; the Judge committed him to the Marshalsea; the following

* Cro. Car. 146.

day the Marshal brought him before the full Court, when, being interrogated, he confessed his contempt; upon which he was committed, and punished. Practically, therefore, no inconvenience results from the right to punish contempts being in the full Court, *if there be but a full Court which can punish them;* but, in the case of the Commissioner, practical inconvenience at once results; the obstruction of the individual Commissioner is a contempt of him, or of no Court at all; for he is not, like a Judge at chambers, acting in aid of another Court, to whom he can, by oral communication and confidential intercourse, certify the facts, and through whom, upon the confession of the party, punishment can be inflicted: the Commissioner will be obstructed in the performance of his duty, and there will exist no power, which can remove the obstruction, or punish the delinquent.

Every fiat of Bankruptcy is directed to "the Court "of Bankruptcy," is entered of record in "the "Court of Bankruptcy," and is to be prosecuted in "the Court of Bankruptcy;" and yet, in the vast majority of cases, every proceeding in the prosecution of that fiat, from beginning to end, takes place before the individual Commissioner; every individual act of his is intitled "In the Court of Bankruptcy," and is recorded as an act of "the Court of Bankruptcy." and the record itself is made up by, and is in the legal custody of, the deputy registrar attending his Court. For myself, I have no recollection of one single act having been done in Subdivision Court in

any one case, which has been prosecuted before me, within the last two years; and yet undoubtedly every act done by me, pursuant to my jurisdiction, and duly recorded, has been an act of the Court of Bankruptcy. Had their Lordships been acquainted with these facts, could they have held, that "*all the "authority and power, which the Commissioners of "Bankruptcy had before, was vested in the Courts "of Subdivision?*

It was also argued, that it could not be intended that the single Commissioner should have this power, because it was provided by the Act, that the single Commissioner should not commit a party examined before him otherwise than to the custody of a messenger, to be brought up before a Subdivision Court within three days after such commitment. But this was a limitation imposed upon the exercise of a power of a most extraordinary nature, the power of committing, because the examinant, though answering both fully, distinctly, and positively, does not answer so as to convince the Commissioner that he has answered *truly;* a commitment which, according to its terms, is to last until the examinant gives an answer more satisfactory, which has in some instances lasted for several years, may last for life, *and from which even the Crown cannot release:* and it is difficult to understand, how a special limitation upon the exercise of so extraordinary a power,—a power possessed by no other jurisdiction in the kingdom,—can be taken as evidence of an intention by the Legislature to withhold the most ordinary of all

powers*, a power possessed even by the Steward of a Court Leet, the nominee of a subject.

But, whether this decision be right or wrong, is not very material: it is the decision of a Court, having jurisdiction to decide; is therefore established law; and for all practical purposes must be considered as such. Henceforth, therefore, every Commissioner, on each successive day, must take his seat in Court with the feeling, that he cannot bestir himself in the repression of fraud, or the protection of the absent, except at the peril of being openly insulted.

That a Judge ought to be protected from personal insults, is admitted: yet, it is obvious, that a Judge is not in such peril as a Commissioner of the Court of Bankruptcy, *sitting alone and unassisted.* A proof is tendered; it is for money lent; the story told is a story only too common: the money was lent, *when nobody was by,* the excuse being, that the bankrupt was in distress, and did not like to disclose the state of his affairs: there is no entry in the books of either party; not in those of the bankrupt, for the same reason; not in those of the lender, for he is, as he states, a gentleman at large, living on his means; there is no collateral evidence derived from bankers' entries, for neither party employs a banker; the money was lent in gold only, or in gold and notes; neither party can remember the proportions.

* Murray's Case, 1 Wils. 299. Mr. Justice Foster.—"All "Courts of Record, *even the lowest,* may commit for a contempt."

In such cases it frequently happens that the suspicion of fraud originates with some respectable tradesman, and it is he who urges inquiry. The petitioning creditor and the solicitor chosen by him, or the assignee and the solicitor chosen by him, are perhaps in the interest of the bankrupt, and will not inquire; the duty falls on the Commissioner. If he performs it, he can scarcely avoid giving offence; if the suspicions are unfounded, the course of inquiry, implying suspicion, is highly offensive; if the suspicions should appear well-founded, and the Commissioner should reject the proof, the offence is at least as great; if the claimant insists on knowing why his proof is rejected, the Commissioner may be compelled to express his insulting belief, viz. that the claimant has sworn falsely. In a Court of Law, a conclusion imputing perjury is the conclusion of the Jury, not of the Judge; in Chancery, it is expressed, if at all, in the presence of counsel and solicitors, seldom in that of the party; and hence in Courts of Law and Equity the occasions for the ebullition of feeling are rare, as compared with those, which arise in the Court of the Commissioner.

Again, at Law and in Chancery, there are litigant parties; if the Judge expresses an opinion unfavourable to one party, he does so mostly upon the urgency and pressure of the antagonist, and hence the indignation of the insulted party spends itself on the antagonist. In Bankruptcy, there are often no litigant parties; but the Commissioner feels compelled by a sense of duty to protect the interests of

justice, or of the public, or of that indistinct body, the absent creditors: if he expresses an unfavourable opinion, he appears to *originate* it; and upon him, therefore, the storm is apt to burst. The very case, in which I interfered, is an illustration of this argument: the creditors' assignee took no step, for he knew nothing about the matter; the official assignee made no objection to the payment, for though he knew the facts, he did not know the law; and upon the law the solicitor abstained from advising him, being at the moment acting as agent for the solicitor of the adverse party: by the merest accident—that accident being the refusal of the solicitor to "submit "to a reduction of one shilling" in his demand—the matter reached me; I did my duty; and upon me therefore the storm of indignation burst.—A further curious illustration of this argument is furnished by an affidavit of Mr. F. filed in the Exchequer: for it would appear from a passage in that affidavit, that Mr. F. would have thought little of my interference, had I been urged by another party to interfere; his complaint seems to be, that I *originated* the interference; for he says, "that conceiving the said "Commissioner had no power or right to interfere "with the conduct of deponent on the said occasion, "and that there was no matter *judicially or pro-* "*perly before him,* &c. &c., deponent did observe to "the said Commissioner," &c. &c.

How long Commissioners of the Court of Bankruptcy will continue to do their duty, in protecting the Publick, under a state of the law, so calculated to

paralyse all energy, may well be deemed matter of doubt. That they will not openly declare their unwillingness, is highly probable; for they will scarcely venture to proclaim a principle of action, or rather inaction, which might involve removal from their offices. But will they really act? will they bestir themselves? Under the superseded system, the Commissioners had certain powers of commitment; but if they made the most innocent mistake, they were responsible in damages; if they committed, they could gain nothing, and might lose largely; if they did not commit, they were safe: what was the consequence?—that the Commissioners openly declared, that they would not do their duty? No, they did not venture on that; they only *did not do it.* I was a Commissioner under the superseded system ten years: during that time, the List, of which I was a member, could never be prevailed upon to commit a single person; although there were cases in abundance, where it was obvious that property had been concealed to the extent of thousands. Since the introduction of the new system, I have committed in three instances, and three only: in the first, the bankrupt produced the following morning from a secret pocket 2400*l.* in bank notes; in the second, the missing property was recovered; in the third, the bankrupt, on his next examination, acknowledged his intended frauds, and disclosed where his property was concealed.

The Commissioner must also take his seat with the painful feeling, that, as he cannot protect him-

self, so neither can he protect any other person attending his Court. Even within one week, I have twice undergone that painful sensation. On the first occasion, a gentleman of eminence at the bar, and remarkable for the courtesy of his manner, was attending in my Court, as counsel. Circumstances occurred, which compelled him to appeal to me for protection. I was obliged to remind him of the late case in the Exchequer, and to express my surprise, that he should appeal to me, when it was notorious in the profession, that my Lord Abinger, Mr. Baron Bolland, and Mr. Baron Alderson, had unanimously decided, that the Commissioner had no power to protect either himself, or any person attending his Court. On the second occasion, a solicitor, apparently a most respectable practitioner, appealed to me, stating that a person in Court had just called him "a damned liar." Again I was obliged to express my regret, that the late decision of the Court of Exchequer precluded all interference on my part.

Since writing the above, the following case has occurred:—A bankruptcy was in prosecution before me, which had every appearance of being a case of gross fraud. The bankrupt had not surrendered until several days after the usual time, and in the meanwhile much of his property had been discovered at different places, deposited in the names of third persons. A quantity of wine was still missing, and I was myself examining the bankrupt for the purpose of ascertaining what was become of it. A Mr. Dicas

was in attendance as attorney for the bankrupt. It appeared to the solicitor to the fiat, and to the official assignee, that Mr. Dicas was speaking to the bankrupt in an under tone, and they appealed to me. If I had expressed an opinion, it would have been in favour of Mr. Dicas; but, before I had time to speak, Mr. Dicas addressed himself to the solicitor to the fiat, and to the official assignee, in a tone of the extremest violence, to which, as was natural, the solicitor to the fiat replied. Having learnt from the Court of Exchequer that I had no power to repress such personalities, I put an end to the inquiry, and withdrew; offering, however, to adjourn the examination to the Court of Review, where the observance of order and decency could be compelled. Whether the parties will prosecute the inquiry there, I know not; but in the meanwhile much valuable time must be lost; and if the inquiry is prosecuted there, the expense will be at least twofold, for briefs must be prepared and counsel must be retained*.

* The waste of property which occasionally arises from the absurdities of the present system, is curiously illustrated by the accounts of the above case, as made up to the present time and furnished me by the official assignee.

"Re ———

Statement of Account to 21st November, 1837.

Gross amount of property and debts received .						£1589	5 8
Expenses.							
Fees of Court . . .			£47	0	0		
Rates and Taxes . . .			38	2	0		
Rent			15	15	0		
Carry forward . .			100	17	0	1589	5 8

I am sure that your Lordship will do me the justice to believe, that in thus urging the necessity of arming the Commissioners of the Court of Bankruptcy with the power in question, I am influenced by no other motive, that a deep-felt anxiety to promote the public good; that my desire is, that the Commissioners should possess, not that they should exercise, the power; the possession, indeed, would render the exercise unnecessary; that my wish is,

---

Brought forward	£100	17	0		1589	5	8
Wages of Ostlers, &c., and expences of keeping Horses previous to sale	77	9	8				
Paid for Beer supplied, to Rose Inn, Gravesend, to carry on business	27	4	8				
Redeeming Carriages pawned by Bankrupt	135	12	3				
Official Assignee . . .	50	0	0				
Law-expences	999	11	11				
Messenger	138	4	11				
Fire Insurance . . .	2	16	3				
Postage and Stationery . .	8	14	7				
					1540	11	3
Balance in hand . .					£48	14	5
Still due to Messenger . .	22	10	6				
for Law-expences, about	130	0	0				
	£152	10	6				

" It is possible there may be a further receipt of about £100.

Besides this waste, about 1000*l.* worth of property has been sacrificed, by the natural shrinking of the assignees from the fearful responsibilities, to which they are exposed, whenever the Bankrupt disputes his Bankruptcy. In this case, the Bankrupt thought proper to bring an action against the official assignee; and he has also given notice of an action for false imprisonment, against the members of a Subdivision Court, which committed him ! !

that they should be furnished, not with a weapon of offence, but with a means of defence; not with a sword to wound, but with a shield to defend; in a word, that, in the performance of their duties, instead of being disturbed by constant apprehension, *they may enjoy that sense of security, without which judicial equanimity cannot exist.*

The thing to be feared in all public functionaries, particularly in those who preside in Public Courts of Justice, is, not that they will do wrong, but that they will neglect to do right: their sins, if any, will be not sins of commission, but sins of omission; the danger is, not that they will oppress—for that they cannot do without incurring public exposure and public reprobation—but that they will abstain from protecting, for that they can do in secret, without attracting the public observation at all; while at the same time they indulge that love of indolence, which is natural to all mankind. To declare that a Commissioner may be insulted for doing what is right, is to place his interest in conflict with his duty: it is his duty to be active, it will be his interest to be passive; for, by being passive, he will avoid trouble and personal annoyance. It may, indeed, be hoped, that persons, placed in public situations, will be too conscientious to allow themselves to yield to such influences; yet surely it is dangerous to put it in the power even of the most conscientious to say to himself,—"Why "should I interfere to protect the Publick, since the "Publick will not interfere to protect me?"

It may be said, that this power *may* be abused; but the question is, not whether it *may* be, for all power *may* be abused, but whether it is likely to be abused; and upon this point it is surely some evidence, that although there exist so many Courts, and so many individuals, who possess or have possessed this power in different parts of the country, no instances of abuse appear. For four years and upwards, the Commissioners of the Court of Bankruptcy have been engaged daily in the performance of most unpopular duties; interfering with persons before uninterfered with; withdrawing control over money from creditors' assignees, and solicitors, and giving it to official assignees; and it is notorious that they have thus caused the distribution of several hundred thousand pounds, which, but for their interference, would still have remained undistributed. They never, till lately, even doubted their possession of the power in question; and yet in no instance has any Commissioner exercised it, but in the case now under discussion. And can it seriously be said, that the exercise of it in that case was an abuse of power? Can any man call it an abuse of power to impose a moderate fine for the King's use, in other words, compel a moderate contribution to the public purse from a person, who has indulged himself in the luxury of writing an offensive letter to a person exercising judicial functions, touching a matter judicially before him? The tendency of such exercise of power, must be to render such acts *less* frequent; and is it desirable that such acts should be *more* frequent? Can any man, however

ingenious, point out any advantage, however small, that can accrue to the Publick from the uncontrolled license of addressing letters to a Judge, touching a matter judicially before him? Such a letter, whether it contain *a bribe* or a threat, flattery or an insult, is equally improper: its intention and its tendency must be to interrupt the proper exercise of the judicial functions; such interruption must be a mischief; and can it be an abuse of power to do that which is calculated to repress a mischief?

* * * * * * * *

I have the honour to subscribe myself, with great respect,

Your Lordship's
Most obedient humble Servant,
C. FANE.

The Court of Commissioners of Bankrupts,
10th March, 1836.

* Some paragraphs in the original letter are here omitted.

APPENDIX.

NOTE A.

A. B. commenced business in London, in January, 1831. It would seem, from what followed, that this business was commenced, in pursuance of a scheme, devised between himself and his father-in-law, to defraud wholesale houses. The plan was, to obtain goods to a large amount—procure himself to be declared Bankrupt by means of a fictitious Petitioning Creditor—carry the choice of Assignees by a body of Creditors, equally fictitious—stifle all enquiry, by vesting the management of the estate, and the estate itself, in assignees, who were co-conspirators—administer the estate, so as to extract from it the greatest possible amount of capital, with which to commence business afresh—procure a certificate by means of the fictitious Creditors, and again enter into trade freed from all demands. The commission issued in November following, and every thing proceeded successfully according to the plan. The fictitious creditors were admitted to prove, co-conspirators were chosen assignees, the property was turned into money, and a dividend declared early in 1832. It may not unreasonably be supposed, that the only thing which distressed the conspirators, was the necessity of restoring part of their ill-gotten gains to the real Creditors in the form of dividends. Meanwhile, the New Court of Bankruptcy was created, and there was introduced into the administration of Bankrupts' estates certain new officers, called Official Assignees—men, who have been found the most effectual preventatives of fraud, delay, and expense; and whose office has, in consequence, been made, ever since its creation, the subject of never-ceasing attack, by individuals whose sources of revenue have been thus dried up. Suspicions having arisen, an application was made to the Commissioner for the appointment of an Official Assignee; and fortunately a gentleman was appointed, remarkable for zeal, even amongst the zealous. The first material fact that turned up was,

that one of the Creditors' Assignees had embezzled £348; he absconded, and was removed; but another co-conspirator was, of course, chosen in his place. The progress of enquiry carried conviction to the mind of the Official Assignee, that many of the proofs were fictitious; but, as the Bankrupt had been a skilful book-keeper, had mixed true and false entries with considerable art, and had, with the concurrence of the Creditors' Assignees, suppressed such documents, as would have disclosed the truth, the Official Assignee was baffled; and he found himself compelled to pay two dividends to persons, who, he was convinced, were fictitious creditors. About two years afterwards, he learned, that there was a man, who could give material information; this man was immediately summoned, and examined before the Commissioner; his disclosures proved, that the debt of the Assignee who had not absconded was fictitious, and steps were taken for expunging it from the proceedings. Upon the enquiry, witness after witness, (all issuing from the same haunt, a public-house kept by the father-in-law), perjured themselves in the most fearful manner; but, as their perjuries were too gross to deceive, the proof was expunged by the Commissioners, sitting in Subdivision Court. The Creditor appealed, but his appeal was dismissed. The conspirators then prosecuted the person, who had betrayed them, for perjury; he was, however, acquitted on the evidence produced by the prosecutors.

In the course of this trial, it came out, that the Bankrupt, though uncertificated, was carrying on an extensive business as a coal-merchant; upon which the Official Assignee took measures for seizing his property, books, &c.; and, on this occasion, he at last possessed himself of the books and papers, necessary to establish the frauds. From this moment, he proceeded steadily in his enquiries; proved clearly the nature and extent of the frauds; recovered a great deal of property; and having procured the fictitious proofs to be expunged, caused such of the dividends as had been received by responsible men to be returned to the estate. The bankrupt, his father-in-law, the petitioning creditor, and one of the creditors' assignees, were prosecuted for a conspiracy, and convicted.

It is from Courts, which have occasionally to deal with such cases, and such persons, as the above, that it is thought right to withhold powers, which have been deemed, by every civilised nation in the world, to be inseparable incidents to a Court of Justice! Is it surprising that abuses should abound?

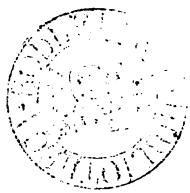
NOTE B.

Erskine's Institutes of the Law of Scotland, Bk. i. tit. 2, par. 5. "In all Jurisdiction, though merely civil, there is an inherent power in the Judge to punish, either corporally or by a pecuniary fine, those, who offend during the proceedings of the Court, or who afterwards obstruct the execution of the sentence; "omnia enim cum Jurisdictione concedi videntur, sine quibus Jurisdictio explicari nequit."

NOTE C.

When the above argument was written, the writer was not aware, that the Committee of the House of Commons, which sat, during the Sessions of 1817 and 1818, to enquire into the then state of the Bankrupt Law, and which in 1818 made its report to the House, had reported as follows :—"That it is essential to the due adminis-"tration of the Law by the Commissioners, that they should sit as "Judges; each list constituting a Court of Justice, with full power "to enforce order, and commit for contempt of their meetings."— Parl. Paper, Sess. 1818. No. 276, p. 20.

THE END.



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